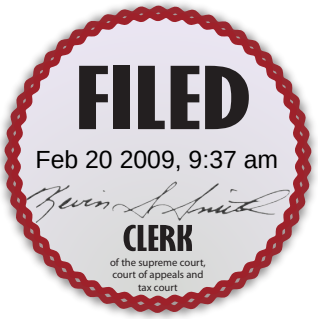

ATTORNEY FOR APPELLANT:

MARK SMALL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

THOMAS D. PERKINS
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

RAYE PAXSON,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 38A02-0807-CR-616
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE JAY CIRCUIT COURT
The Honorable Brian D. Hutchinson, Judge
Cause No. 38C01-0707-FC-9

February 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Raye Paxson appeals from her convictions for Class D felony Obtaining a Controlled Substance by Fraud or Deceit[1] and Class D felony Attempted Obtaining a Controlled Substance by Fraud or Deceit.[2] Paxson argues that the trial court abused its discretion in admitting certain evidence, that her conviction for obtaining a controlled substance by fraud or deceit is not supported by sufficient evidence, and that her convictions violate the "same actual evidence" rule. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 21, 2007, Nurse Practitioner Camille Elick of Family Practice of Jay County wrote a prescription to Paxson for sixty pills of Xanax, specifying two refills. The prescription, which had been altered without Elick's authorization to be for 120 pills of Xanax, was filled later that day for 120 pills when presented by Paxson at a Wal-Mart in Portland. On March 16, 2007, Paxson attempted to have the Xanax prescription refilled for 120 pills. The Wal-Mart pharmacy, however, cancelled the prescription after communicating with Family Practice of Jay County.

Ultimately, the State charged Paxson with Class D felony obtaining a controlled substance by fraud or deceit and Class D felony attempted obtaining a controlled substance by fraud or deceit. On February 11, 2008, Paxson filed a motion to suppress evidence obtained from Elick and the Wal-Mart on the basis that its disclosure violated the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). On February 28, 2008, the trial court denied Paxson's motion to suppress. A jury found

[1] Ind. Code § 35-48-4-14(c) (2006).

[2] Ind. Code §§ 35-48-4-14(c), 35-41-5-1 (2006).

Paxson guilty as charged, and the trial court sentenced her to an aggregate sentence of eighteen months of incarceration in the Jay County Security Center with twelve suspended to probation.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in Admitting Evidence Obtained from Elick and Wal-Mart

Although Paxson frames the issue as a challenge to the denial of her pretrial motion to suppress evidence, she actually appeals from the allegedly erroneous admission of evidence at trial. The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002). We will only reverse a trial court's decision on the admissibility of evidence upon a showing of an abuse of that discretion. *Id*. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id*. The Court of Appeals may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court. *Moore v. State*, 839 N.E.2d 178, 182 (Ind. Ct. App. 2005). We do not reweigh the evidence and consider the evidence most favorable to the trial court's ruling. *Hirsey v. State*, 852 N.E.2d 1008, 1012 (Ind. Ct. App. 2006).

Paxson contends that Elick and Wal-Mart violated HIPAA when they provided evidence to the police and that, as a result, the evidence should not have been admitted

pursuant to the exclusionary rule.[3] *See Mapp v. Ohio*, 367 U.S. 643, 649 (1961). Even assuming, *arguendo*, that a HIPAA violation occurred, exclusion of the evidence obtained thereby is not a remedy available to Paxson. In *State v. Eichhorst*, 879 N.E.2d 1144, (Ind. Ct. App. 2008), *trans. denied*, we concluded that "'HIPAA was passed to ensure an individual's right to privacy over medical records, it was not intended to be a means for evading prosecution in criminal proceedings.'" *Id*. at 1154-55 (quoting *U.S. v. Zamora*, 408 F.Supp.2d 295 (S.D. Tex. 2006)). Paxson, as did Eichhorst, has failed to cite any authority for the proposition that evidence gathered in violation of HIPAA should be excluded in a criminal trial, and we are aware of none. *See id*. at 1154. The trial court did not abuse its discretion in admitting evidence obtained from Elick and Wal-Mart employees.

II. Whether the State Produced Sufficient Evidence to Sustain Paxson's Conviction for Obtaining a Controlled Substance by Fraud or Deceit

Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted).

[3] Paxson does not argue that a Fourth Amendment violation occurred and has abandoned the State constitutional argument she raised below.

In order to sustain Paxson's conviction for obtaining a controlled substance by fraud or deceit, the State was required to establish that she "knowingly or intentionally acquire[d] possession of a controlled substance by … alteration of a prescription order[.]" Ind. Code § 35-48-4-14(c). Here, Elick testified that she wrote Paxson a Xanax prescription for sixty pills and did not authorize anyone to change the number. The prescription that Paxson presented, however, was for 120 pills, and the prescription order had visibly been altered to reflect an increased number of pills. Given the above evidence, the jury was free to conclude that Paxson was the person who had altered the prescription. Paxson's argument in this regard is nothing more than an invitation to reweigh the evidence, one that we decline.

III. Whether Paxson's Convictions Violate the Same Actual Evidence Rule

Paxson contends that her convictions for obtaining a controlled substance by fraud or deceit and attempted obtaining a controlled substance by fraud or deceit cannot stand, as they are based on the same prescription. In *Richardson v. State*, 717 N.E.2d 32 (Ind.1999), the Indiana Supreme Court held "that two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to … the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Id*. at 49-50. The *Richardson* court stated the actual evidence test as follows:

> To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Id. at 53. The Indiana Supreme Court has also explained that, when applying the actual evidence test, the question

> is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish *one* of the essential elements of a second challenged offense. In other words, under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.

Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). In determining what evidence the trier of fact used to establish the essential elements of an offense, "we consider the evidence, charging information, final jury instructions … and arguments of counsel." *Rutherford v. State*, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

We conclude that the jury did not rely on the same actual evidence to find Paxson guilty of her two crimes. The State presented evidence that Paxson visited the Wal-Mart on two separate occasions, February 21 and March 16, 2007,[4] successfully having her prescription filled on the first occasion and attempting to do so on the second. The charging informations also are clear that two separate incidents are involved. Finally, the State's opening statement and closing argument both clearly differentiated between the two counts, emphasizing that they were based on two separate acts on two different days.[5]

[4] Paxson notes that the charging information for attempted obtaining a controlled substance through fraud or deceit alleges that she committed the crime "on or about March 2, 2007" but makes no separate argument based on the variance between the information and the proof at trial. Appellant's App. p. 28.

[5] In such cases, we would normally take the instructions into account. Here, however, neither the preliminary nor final instructions were transcribed, and Paxson has not included hard copies of them in her Appellant's Appendix.

Indeed, the only element of both crimes satisfied by the same actual evidence was the "alteration of the prescription order" element, and it is undisputed that the written prescription was only altered once. As *Spivey* makes clear, however, *all* of the essential elements of both crimes have to be established by the same actual evidence in order to violate the *Richardson* "same actual evidence" test. 761 N.E.2d 833. Paxson's convictions do not violate the *Richardson* "same actual evidence" test.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.